United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

74-2694

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P/S

United States Court of Appeals

For the Second Circuit.

FRANCIS X. DONOVAN,

Plaintiff-Appellant,

vs.

PENN SHIPPING CO., INC., and
PENN TRANS CO., INC.,

Defendants-Appellees.

On Appeal From The United States District Court
For The Southern District of New York

Appellant's Brief

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FRANCIS X. DONOVAN,

Plaintiff-Appellant,

- against -

PENN SHIPPING CO., INC. and PENN TRANS. CO., INC.,

Defendants-Appellees.

PLAINTIFF-APPELLANT'S BRIEF

This is an appeal by the plaintiff from an order of the Honorable Murray Gurfein dated September 26, 1974 denying plaintiff's motion for reargument of defendant's motion for a new trial after a jury verdict in favor of the plaintiff in the amount of $90,000 on February 22, 1974. Judge Gurfein had rendered a decision on August 6, 1974 granting defendant's motion unless plaintiff consent to a remittitur in the amount of $25,000. Plaintiff unconditionally waived his right to a new trial and accepted the remittitur under protest. On August 6, 1975, judgment was entered in plaintiff's favor in the amount of $65,000 together with interest from February 22, 1974. On November 21, 1975, the judgment was amended by order of Judge Henry Werker so as to provide for interest only from August 6, 1975. Plaintiff likewise appeals from this order and from the judgment.

FACTS

Plaintiff was an able-bodied seaman employed by defendant on the SS PennSailor. On June 4, 1970 he slipped on wet paint and fell, landing with his right arm outstretched and sustaining a badly broken left wrist, a compound fracture (50*) with the radius bone shattered into many pieces (37), and a fracture dislocation of the right elbow (29) with tearing of the ligaments and lining of the joint (31).

Plaintiff was removed from the ship by ambulance a few hours after his injury and taken to the Marine Hospital in Staten Island, where the fractured wrist was reduced, the elbow put back into joint, and a cast applied to the right arm (29). His pain was sufficiently severe to require intramuscular injections of demerol for a number of days (85). About three of four days after the initial reduction of the fractured wrist, the doctor tried to straighten the hand out by putting wedges in the cast in order to change the position of the bones. This was done without anesthesia and was very painful (11). Plaintiff's right arm remained in one cast for over three weeks (12-13), and a secpnd cast for about a month (13). Plaintiff is right handed.

Plaintiff remained under the care of the Public Health service until December 1, 1970. He returned to work in December, but found that he did not have a strong grip, and that his arm ached for several hours after heavy work (15).

*Numbers in parenthesis refer to pages of the Appendix.

Several times he has had to take time off because his arm was bothering him (26). He has aching in his arm in damp and cold weather (26).

THE MEDICAL EVIDENCE

Donovan was examined by three orthopedic surgeons not associated with the Public Health Service. Dr. John McGillicuddy saw him on August 28, 1970 and again on December 10, 1970. (62.4) His deposition was taken on written interrogatories. Donovan was seen in 1971 and again on February 19,1974 by Dr. Irving Mauer, who testified at the trial, and in March 1971, by Dr. Balensweig, who did not testify.

Dr. McGillicuddy found that the wrist had healed in an abnormal position (62.2) with the radius bone tilted dorsally (62.1) causing an abnormal strain on the bones of the wrist which is conducive to traumatic arthritis in years to come. He found limitation of motion of the wrist and elbow (62.4). He found contractures of the soft tissues of the right elbow and wrist due to scarring (63). He expressed the opinion that the plaintiff would have permanent restriction of motion of the right elbow, wrist and hand and over a long period of time will gradually develop traumatic arthritis (63) of these members. It was also his opinion that Donovan will be limited in his work and will have difficulty in using his right arm in work such as painting, handling

lines and climbing ladders, since he will not have full use of the arm and it will tire easily, become painful, etc. (63-64).

Plaintiff has an obviously deformed right wrist. Dr. Mauer demonstrated this to the jury (42-43). Counsel for defendant recognized this in his summation (65). Not only is there a squashing down and shortening of the radius bone (43), but the wrist is no longer in the proper position of function at the end of the arm (46-47) and this causes limitation of motion and loss of grip (47).

Dr. Mauer found the following restrictions of motion, all of which are permanent:

60% loss of ulnar deviation (43)

50% loss of dorsiflexion (44)

60% loss of flexion (44)

50% loss of grip compared to the left hand, which had previously suffered a fracture of the left wrist, thus making the actual loss of grip of the right hand about 75%. (45,49)

30% loss of pronation and supination. (46)

All of the above are residua of the fracture of the right wrist, which extended into the joint itself (50) and healed with malunion. In addition the fracture of the right elbow never healed. The plaintiff has an extra chip of bone in the elbow joint, together with scar tissue and calcium deposits, which can cause pain. (51)

Dr. Mauer testified, without contradiction, that the plaintiff would never get better and that it was highly improbable that arthritis would not develop, causing further pain and swelling and limitation of motion.(57) He further testified that the injuries sustained by the plaintiff and their condition as observed by him were such as to make performing a seaman's duties difficult. (52)

LOSS OF EARNINGS

Plaintiff's average monthly earnings aboard the Penn Sailor in 1970 were $950.(15) Of this, $475 was base pay for a 40 hour week (16) and the remaining $475 was overtime compensation at $3.44 per hour (Ex 10). In addition, he received $100 per month in supplemental wages, also referred to as "vacation pay" (51). Loss of earnings for the 6 months period of medical treatment amounted to approximately $6,000, exclusive of the value of room and board which is free to seaman aboard ship (62).

In the three calender years before joining the Penn Sailor, Donovan, who according to Chief Officer Anderson was a good sailor (60) worked 26 months (Ex # 13 summary, A 77-79). In the three succeeding years he worked a total of 13½ months. During those three years he missed approximately 3½ months from work due to causes unrelated to the condition of his right arm (58-59). During the period from the time of the accident until the trial

there was an $83 per month increase in base pay and an increase of $1.65 per hour in the rate paid for work on Saturdays, Sundays and holidays (A 75 Ex 10). This rate is called "premium pay" and amounts to approximately 75 hours per month (19). During the nine months which plaintiff missed from work in order to rest his arm he lost approximately $10,000 in earnings.

Because of the condition of his arm, Donovan since his accident has turned down most of the voluntary overtime. This has amounted to 35-40 hours per month (18). At $3.44 per hour this comes to approximately $135 per month, or $1800 for the 13½ months worked between the accident and the trial.

Donovan was 54 years of age at the time of the trial (7). Under the Union contract in effect at that time, an additional wage increase went into effect on June 16, 1974 of $29.18 per month on the base pay and 25 cents per hour on premium pay (A 75 Ex 10), amounting to an effective increase of $48 per month overall. The cumulative effect of all the increases shown in Exhibit 10 was to raise the average monthly earnings by $260 from what they had been in 1970 and thus to increase the earnings of an able-bodied seaman to $1300 per month ($1200 & $100 vacation pay). Thus a loss of three months per year would amount to $4,00 per year, or approximately $40,000 over an eleven year work expectancy. Assuming that plaintiff could man-

age to work 5½ months per year, the loss of 40 hours overtime per month would amount to an additional $750 per year, or $7500 over eleven years.

THE PROCEEDINGS BELOW

Suit was commenced in the United States District Court for the Southern District of New York on August 18, 1970. Issue was joined on December 3, 1970.

The case came on for trial before the Honorable Murray I. Gurfein and a jury on February 20, 21 & 22, 1974. In answers to special interrogatories submitted by the court, the jury found that plaintiff's injuries were caused by the fault of the defendant, with no fault of the plaintiff contributing thereto, and fixed plaintiff's damages in the sum of $90,000 (73-74).

At the conclusion of plaintiff's counsel's summation, counsel for defendant moved for a mistrial, claiming that he had been misled by the notation as to premium pay in Exhibit 10, the admission of which he had consented to. (66-72) The Court, after offering defense counsel another summation (71), reserved decision on defendant's motion, but stated (71)

" THE COURT: Don't forget this, that I can always reduce the verdict if I feel it's excessive, Mr. Healey"

After the verdict, defendant renewed its motion for mistrial and moved for a new trial (81). On August 6,

Donovan

1974 the Court rendered its opinion denying the motion for a mistrial, but granting a new trial unless the plaintiff consents to a remittitur of $25,000 (99-106).

On August 16, 1974, plaintiff moved for reargument, and filed a brief setting forth specific evidence which the Court had overlooked in its opinion, and at the same time waived his right to a new trial. On September 26, 1974 motion for reargument was denied. On October 3, 1974 plaintiff filed a notice of appeal from the order denying reargument. In July, 1975, at the request of the Court, plaintiff prepared a judgment and presented it to the Court for signature. This judgment (118) which provided for interest from the date of the jury verdict, was entered on August 6, 1975. Defendant moved to amend this judgment so as to delete therefrom any mention of plaintiff's having accepted the remittitur under protest and also to delete the provision for interest from the date of the jury verdict. On November 21, 1975, Judge Henry F. Werker, to whom this case had been reassigned, rendered his decision granting defendant's motion to the extent of striking the award for interest before August 6, 1975 (121). On December 22, 1975 plaintiff filed a notice of appeal from this decision.

QUESTIONS PRESENTED

1. Did the trial court err in granting defendant's motion for a new trial?

2. Did the trial court err in denying plaintiff's motion for reargument?

3. Did Judge Werker err in amending the judgment of August 6, 1975 so as to exclude interest from February 22, 1974?

4. Is the order of Judge Gurfein or the judgment entered thereon appealable without requiring plaintiff to undergo a second trial?

POINT I

THE TRIAL COURT SHOULD HAVE DENIED DEFENDANT'S MOTION FOR A NEW TRIAL.

A. Exhibit 10 was a completely accurate summary of the overtime and premium rates in effect from the time of the accident until the time of the trial.

Although the trial judge ultimately denied defendant's motion for a mistrial, it is a fair inference that the court was influenced by its counsel's vociferous insistence that he had been misled as to the contents and meaning of this exhibit to whose admission he had consented (20-21, 61). The Court offered counsel an opportunity to sum up again to the jury on these figures, which was declined,. The Court's doubts about the accuracy of the exhibit were reflected in its statement to defense counsel even before the verdict that he had the power to reduce it, and by his instruction to the jury after they had retired and returned with a question, to disregard the premium rates contained in the exhibit. (A72.3)

In his memorandum in support of the motion for a new trial counsel for defendant asserted that plaintiff's counsel had (A94-95).

" alleged an increase of $125 per month in premium time and then continued to spin this figure out along with other suppositions and reached the astronomical figures for lost earnings. As the record clearly demonstrates,

there was obviously no proof to support a premium pay argument. The jury's verdict was so at odds with common sense and the evidence that this misrepresentation was obviously effective."

The plain fact of the matter is that the remarks of plaintiff's counsel regarding premiun pay were completely in accord with the union agreements in effect between June 16, 1970 and June 15, 1975. These agreements were not offered in evidence because their pertinent provisions were accurately summarized in Exhibit 10. The relevant part of the agreement in effect at the time of plaintiff's accident is reproduced at p 76 of the appendix. There is no provision for premium pay, which was instituted in the agreement of June 15, 1972 (76).

B. <u>There was ample support in the record for the $90,000 award</u>.

The following are the items of damage properly awarded by the jury in this case:

1. Loss of earnings during medical treatment (1970)
2. Loss of earnings 1971-1973 inclusive:
   a) base pay for time lost from work
   b) premium pay and overtime for time lost from work
   c) vacation pay for time lost from work
   d) loss of room and board

e) diminished overtime while working

3. Future loss of earning capacity

a) base pay

b) premium pay and overtime

c) vacation pay

d) loss of room and board

e) diminished overtime while working

4. Pain and suffering to date of trial

5. Pain and suffering and permanent injury in the future

Proof of above damage items

1. The proof that Donovan lost $6000 in 1970

2. a) 9 months @ average wage of $540 = $ 4,850

b) average Sat., Sun. & Holiday 75 hrs. x 9 months @ average rate of $4.25 = 2,870

average overtime 65 hrs. x 9 x $3.44 = 2,010

c) $100 x 3 months x 3 years = 900

d) Donovan is single; the value to him of room and board to at least $10 per day or $300 per month x 9 = 2,700

e) 13½ months x $135 = 1,800

$15,130

3. a) 3 months per year @ $612.85 x 11 - 11% (McWeeney formula, p 343) = $18,000

b) 75 hrs. x 3 x $5.34 x 11 - 11% = 11,750

65 hrs. x 3 x $3.44 x 11 - 11% = 6,560

c) $100 x 3 x 11 - 11% = 2,940

d) $300 x 3 x 11 - 11% = 8,800

e) $135 x 5½ months x 11 - 11% = 7,260

$48,750

4. In Grunenthal v. L.I.R.R., DC SDNY 1967, 292 F. Supp. 813, in an action for a painful crush-type injury to the foot of a 41-year-old railroad worker, the jury brought in a verdict of $305,000 which was in excess of the amount demanded in the complaint. The trial judge, Judge Cooper, computed the loss of earnings at approximately $150,000 taking into account for the wage increases and that the jury properly awarded approximately $150,000 for pain and suffering. The trial judge commented that the plaintiff, in giving his testimony concerning his injuries, had shown total lack of exaggeration and also that the testimony of plaintiff's medical expert was unrebutted. Both comments would apply equally to Mr. Donovan. Despite

the extremely painful nature of his injuries and his subsequent treatment, including the "wedging" of plaintiff's cast so as to reset the wrist in an attempt to obtain a better position of function, the strongest language that the plaintiff used was to say (at A 8):

"I felt miserable, I was in constant pain."

And of the pain in the hospital:

"Pretty rough. Iwas in a lot of pain."

And with regard to the wedging of the cast without anesthetic:

"Pretty miserable. I hit the overhead."

As far as his current condition is concerned, he testified (p. 26):

> "My arm is very sore after climbing the ladders.... Several times I have had to take time off because my arm was bothering me."

When asked about whether his arm bothers him when not working, he said:

> "Yes, when the weather changes--damp weather or cold weather--it starts to ache."

Certainly Mr. Donovan's testimony can be described as candid, restrained, and with no hint of exaggeration.

In discussing the jury's function, Judge Cooper recognized the fact that jurors will not always react the same to pain and that therefore the range of an award for pain and suffering may be wide. He said: (292 F. Supp. 813 at p. 816)

"....Reasonable and controlled reaction to pain and suffering varies with man's innate, sensitive response to the woes and laments of those stricken and bereaved--especially where clearly unearned or cruelly inflicted. Who is to say this jury believed such an award fair and proper, we find nothing untoward, inordinate, unreasonable or outrageous--nothing indicative of a runaway jury or one that lost its head--in its reflected resolution to so respond."

Surely, when the severity of Mr. Donovan's injuries is considered, along with the pain and discomfort both during the six months of treatment and during the subsequent 3 years up to the trial, an award of at least $25,000 for these items of damages would be amply justified.

In the case of Tarabocchia v. Zim Israel Nav. Co., 297 F. Supp 378, DC SDNY 1969, Judge Lasker awarded $12,500 for past pain and suffering, and $5 per day for future pain and suffering, to a 33 year old longshoreman whose injuries were certainly no more severe than Donovan's, and who was not permanently disabled from the heavy work of a longshoreman. This Court affirmed those findings, but required the figure for future pain and suffering to be discounted. Two observations are pertinent:

1. The judicial award by Judge Lasker could not be said to be the outermost limit.

2. The award was made in February, 1969, and inflation has eroded the dollar by over 40% since then[1]. Thus, Judge Lasker's award, in current dollars, would exceed $17,500.

1. c.f. Article by Judge Edelstein, New York Law Journal, May 1, 1975, p. 23.

5. Donovan had a life expectancy of twenty years (A 100). If one uses only the $5 per day figure found to be fair and reasonable by this Court in Iarrabochia, allowing a 40% increase for devaluation and discounting according to the McWeeney formula, the award for future pain and suffering would be over $40,000 (7 x 365 x 20 - 20%).

Defendant's Analysis of the Proof

Counsel for defendant, in his brief in support of the motion for new trial, calculated the maximum damages justified by the evidence to be $56,000 in addition to pain and suffering, which he felt merited at most an award of $15,000 (brief, p. 7). (A 114)

Defendant did not strongly dispute that the jury might have awarded a maximum of $6,000 for wages lost during treatment (brief p. 7). (A 114)

Defendant lumped together 2e & 3e and arrived at a figure of $14,000 for the loss of overtime while working during the period from December 1970 to the end of plaintiff's work expectancy (a total of 14 years) at $14,000 as discounted under the McWeeney formula. (brief p8)(A 115)

Defendant lumped together 2 a,b,c and evaluated this at a maximum of $8,400 [2] (2.8 months per year x 3 years x $1,000 per month).

Defendant lumped together 3 a,b,c, and computed the maximum future loss of earnings while not working at 2. Defendant's brief, p. 9 (A 116)

$27,700 as discounted, allowing 2.8 months loss per year at $1,000 per month.

Defendant's calculations did not include any amount for loss of found during 2.8 months per year.

The total of defendant's calculations, without found is $56,000. The total of plaintiff's calculations, with found, is $69,000, or $58,500 without found. These calculations are, of course, exclusive of damages of pain, suffering and permanent injury.

POINT II

THE TRIAL COURT SHOULD HAVE GRANTED PLAINTIFF'S MOTION FOR REARGUMENT.

The Court's analysis of plaintiff's damages:

1.	loss of earnings June 1970 to December 1970	$ 6,000
2.	loss of earnings December 1970 to trial for 9 months out of work and 40 hrs./mo. lost overtime	8,400
3.	loss of earnings in the future based on 3 months loss of earnings per year and 40 hrs. per month lost overtime as discounted under McWeeney formula	$30,710.34
4.	pain and suffering to the date	

of the trial $ 5,500

5. future pain and suffering at the rate of $3 per day $16,500 discounted to $13,860

Errors in the Court's analysis

1. The Court found that the evidence justified a finding that Donovan has lost and will lose 40 hours overtime per month during each month that he worked or will work. (101-103) In the subsequent analysis of damages, the Court then transposed this figure of 40 hours per month and used it instead of the 140 hours per month clearly demonstrated by the evidence as the average number of hours of overtime worked before the accident. Thus, in calculating loss of earnings for the three months per year which the Court found plaintiff could have been found to lose (102-103), plaintiff was short-changed by 100 hours of overtime per month most of which was at the higher premium rate. Although a more sophisticated analysis is contained in appendix pp 109-112, in rough figures this error amounted to about $17,000.

2. The Court completely ignored the $100 per month that plaintiff had lost and would continue to lose on account of loss of vacation pay (51) for the 3 months of each year when he was prevented from working. In round figures this oversight cost plaintiff $4000.

3. The Court allowed nothing for the value of

the plaintiff of lost room and board for the same 3 months per year. At $10 per day, this loss amounts to approximately $12,000.

4. In computing future pain and suffering at $3 per day, the Court erroneously used a life expectancy of 16 years (A104), although recognizing earlier in the opinion that the correct figure was actually 20 years (A100). This error cost the plaintiff over $3500.

The cumulative result of the above errors and omissions is over $36,000. The remittitur was $25,000.

It is of course well settled that in ruling on a motion for a new trial, the Court must view the evidence in a light most favorable to the plaintiff and must assume that the jury resolved every disputed item of damages in a manner logically consistent with their verdict and drew inferences from that evidence in plaintiff's favor. Chambers v. Tobin, 118 F.Supp. 555, 559. A new trial should not be granted so long as the verdict is not so high that it would be a denial of justice to permit it to stand. Dagnello v. Long Island Railroad Co., 289 F2d 802.

It is respectfully submitted that the learned trial judge failed to apply these standards to his analysis of the evidence, and that the evidence amply justified the jury's verdict.

POINT III

THE JUDGMENT OF AUGUST 5, 1975 SHOULD HAVE INCLUDED INTEREST FROM THE DATE OF THE JURY'S VERDICT.

Rule 58 of the Federal Rules of Civil Procedure provides that, unless the Court otherwise directs, judgment upon the verdict of a jury shall be entered forthwith by the Clerk. There is nothing in the record here to indicate that the trial court directed that judgment be not entered forthwith. Thus under the rule, the date of the verdict and the date when judgment should have been entered are the same in this case.

In Louisiana & Arkansas Ry Co. v. Platt, 142 F2d 847, an FELA case, the Fifth Circuit allowed interest from the date of the verdict, though the trial court had granted judgment non obstante veredicto in favor of defendant, which was later reversed. In so deciding, it relied on the equity power of the court as enunciated in National Bank of the Commonwealth v. Mechanics National Bank, 94 US 437 and in Griffith v. Baltimore & O. R. Co., 44 F 574; Id, 159 US 603. In fairness, defendant has had the use of the money which became liquidated with the jury's verdict, and should in fairness be required to pay interest thereon at the modest statutory rate. c.f. Swartzbaugh Manufacturing Co. v. U.S., 289 F2d 81.

If this action had been brought in the State Court,

interest from the date of the verdict would have been mandated by C.P.L.R. § 5002, which provides:

> "Interest from verdict, report or decision to judgment. Interest shall be recovered upon the total sum awarded, including interest to verdict, report, or decision, in any action, from the date the verdict was rendered or the report or decision was made to the date of entry of final judgment. The amount of interest shall be computed by the clerk and included in the judgment."

The annotations to Cahill Parsons New York Civil Practice, Third Edition, cite only one federal case relevant to the above provision, Voelker v. Delaware L & W R Co., WDNY 1939, 31 F.Supp. 515. The Voelker case states flatly that the above rule applies in the Federal Courts in New York. Weinstein Korn Miller, New York Civil Practice, Vol. 5, Sec. 5002.01, footnote 2 also cites the Voelker case for the same proposition. The application of the rule in the Federal Courts is just, for otherwise the amount of damages recoverable could vary from one court to another on the same cause of action.

Usually, the problem does not arise in the federal court, because the clerk will enter judgment forthwith regardless of whether or not defendant has reserved his right to make posttrial motions or whether such motions have been made and decision reserved by the court. c.f. Litwinowicz v. Weyerhaueser Steamship Company, 185 F.Supp. 692.

Despite the annotations of the textbook writers cited above, and the basic fairness and desirability of

uniformity with the state courts, some prior decisions of this court have created a seeming conflict. In Fowler v. Redfield, (CCNY, 1862), F. Case No. 5003, interest was allowed from the date of the verdict. See also Gunther v. Liverpool L & C Ins. Co., 10 Fed. 830 (CANY 1882). In Murphy v. Lehigh Valley R. Co., 158 F2d 481, interest was allowed from the date when the plaintiff accepted the remittitur, though judgment was not entered on the docket until two weeks later. The corresponding date in the instant case would be September 26, 1974, when the trial court denied plaintiff's motion for reargument after plaintiff had filed a brief waiving his right to a new trial.

In Briggs v. Pennsylvania R. Co., 164 F2d 21, there was a jury verdict for the plaintiff, but the trial court dismissed the case for lack of jurisdiction. On plaintiff's appeal, this court reversed, with directions that judgment be entered on the jury's verdict. The mandate was silent regarding interest. The trial court entered judgment for the plaintiff and added interest from the date of the verdict. Defendant appealed, and this Court reversed, holding that in the first place Murphy dictated a different result, and in the second place the trial court was without power to add interest when the mandate of the Court of Appeals made no mention thereof.

Because this decision seemingly conflicted with the holding of the Fifth Circuit in Platt, certiorari was granted,

333 US 836, 68 S.Ct. 609. However, the Supreme Court, in a five to four decision, affirmed on the second ground, and thus did not reach the question of whether, in the absence of a prior mandate omitting mention of interest, the district court could properly allow interest from the date of the verdict. Previous decisions of the Supreme Court had allowed such interest. c.f. New York Elevated Railroad v. Fifth National Bank, 118 US 608 and Quebec Steamship Co. v. Merchant, 133 US 375.

It is respectfully submitted that the only just result in this case would be to allow Donovan interest from the date of the verdict, when his damages became liquidated. No prejudice will result to defendant-appellee, who has had the use of the money during a period of high interest rates. There is the further advantage of uniformity of result between state and federal courts.

POINT IV

THE ISSUES RAISED IN POINTS I AND II ARE PROPERLY REVIEWABLE UPON THIS APPEAL.

As soon as Judge Gurfein denied plaintiff's motion for reargument, plaintiff waived his right to a new trial and indicated his willingness to accept the remittitur under protest.

The practice of permitting an appeal where a plaintiff has accepted a remittitur under protest can be strongly recommended on the basis of judicial economy, since it eliminates the need for a second trial. Either the Court of Appeals will affirm the order of remittitur or it will reverse, and reinstate the jury's verdict. In either event, no new trial will be required. It eliminates the need for the admittedly exceptional remedy of mandamus. It is fair to both parties, because it requires the plaintiff to give up his right to a new trial with a possibly larger recovery. It is a practice enthusiastically followed in the busiest circuit of all, the Fifth Circuit. c.f. Wiggs v. Courshon, 485 F2d 1281; Gorsalitz v. Olin Mathiasen Chemical Corp., 429 F2d 1033. It has likewise been followed in the Sixth Circuit, Manning v. Altec, 488 F2d 127.

This court, in the case of Reinertsen v. George W. Rogers Construction Corp., 519 F2d 531, considered this question in a case where plaintiff had unsuccessfully sought review by mandamus following a remittitur, and then had a

second trial with a much lower verdict. The court held in that case that plaintiff should have accepted the remittitur and then filed a Notice of Appeal. (The precise procedure followed by Donovan here.) Since Reinertsen failed to appeal from the order of remittitur and had a second trial at which he might have obtained a higher verdict, it was held that the Court would not consider the interesting question as to the appealability of the order of remittitur.

Since Donovan has now complied with the conditions set forth by the Court in Reinertsen, this case is ripe for review.

CONCLUSION

The judgment of the District Court should be reversed with directions to enter judgment on the jury's verdict for $90,000.00 together with interest thereon from the date of the verdict.

Respectfully submitted,

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MATTHEWS 1610 Donovan v. Penn Shipping

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 19 day of Jan. 1976 deponent served the within Brief upon:

Darby, Healey & Stonebridge, Esqs.

attorney(s) for

Appellee

in this action, at

19 Rector St., New York, N.Y. 10006

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey

Sworn to before me, this 19
day of Jan. 1976.

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976